UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 231

Docket No. DE-0752-07-0333-I-1

Jonathan F. Sink,

Appellant,

v.

Department of Energy,

Agency.

October 9, 2008

Mary Ann Sink, Grand Junction, Colorado, for the appellant.

Jocelyn Richards, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board on the agency's petition for review of the initial decision that found that the appellant's retirement was involuntary and, therefore, tantamount to a removal within the Board's jurisdiction. For the reasons set forth below, we GRANT the agency's petition, VACATE the initial decision's interim relief order, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The appellant's last official position of record was as a GS-0301-14 Program Management Specialist with the agency's Office of Land and Site

Management, Office of Legacy Management (LM), in Grand Junction, Colorado. Initial Appeal File (IAF), Tab 1. The appellant, who was 59 years of age at the time of the agency's proposal to remove him for refusing a reorganization-based directed reassignment, became eligible for retirement effective May 2001. IAF, Tab 21, Subtab 6.

¶3 To avoid having its functions outsourced to private contractors as a result of an Office of Management and Budget Circular A-76 "*Performance of Commercial Activities*" outsourcing study, LM conducted an internal review with the aid of a private consulting firm so as to establish itself as a "Most Efficient Organization" or a "High Performance Organization" and thereby exempt from outsourcing competition. IAF, Tab 22, Subtabs 20-25. The review committee's report resulted in a reorganization of LM, with ten employees, whose average ages were 59.8 years of age, being given directed reassignments to positions in different geographical locations than they were presently located in. IAF, Tab 21, Subtabs 5, 7, 19; Tab 22, Subtabs 20-25. The reorganization resulted in the creation of two Property Management Officer positions to be located in Washington, D.C. IAF, Tab 21, Subtab 5 at 4. The appellant was one of the two people determined to be the best qualified to fill one of those two positions. *Id.*, Subtab 11 at 1.

¶4 On August 8, 2005, the appellant was informed of the results of the LM review and his impending directed reassignment. IAF, Tab 21, Subtab 6 at 1. On September 20, 2005, the appellant received a letter of directed reassignment outside of his commuting area that required him to report no later than January 9, 2006, to his new position, GS-2003-14 Supply Management Specialist, located in Washington, D.C. IAF, Tab 21, Subtab 6 at 5; Tab 24, Ex. U at 3-5. The appellant submitted a January 4, 2006 notice that he was declining the reassignment "under duress and protest." IAF, Tab 21, Subtab 12. On January 6, 2006, the appellant received an undated notice of the agency's proposal to remove him, "no earlier than 30 working days from the date of receipt of this letter," for declining his directed reassignment. *Id.*, Subtab 11. The appellant

was placed on paid administrative leave effective January 9, 2006. *Id.*, Subtab 6 at 5, Subtab 14. The appellant submitted a January 16, 2006 written response to the removal proposal. *Id.*, Subtab 13. The appellant received the agency's January 12, 2006 amendment to the removal proposal on January 21, 2006. *Id.*, Subtab 14. The amended notice indicated that the agency proposed to remove the appellant "no earlier than 30 **calendar** days from the date of receipt of this letter," but did not otherwise change the content of the removal proposal to which the appellant had responded in writing. *Id.* Thus, the appellant's removal could have been effected as soon as Monday, February 20, 2006, which was a federal holiday in 2006.

¶5 The appellant had made inquiries to the agency regarding his directed reassignment and the agency provided October 7, 2005, and November 15, 2005 written responses to those inquiries. IAF, Tab 21, Subtab 15. The agency's November 15, 2005 response directed the appellant to contact Human Resources Specialist Theresa Summers of the agency's Employee and Labor Relations Team if he had any further questions. *Id.*, Subtab 6 at 5, Subtab 15 at 6. The appellant received a February 3, 2006 letter from the deciding official that indicated that he hoped to have the decision notice done "in the next two weeks" (as noted previously, the effective date of any action taken in that decision could have been effective as of Monday, February 20, 2006). IAF, Tab 9, Ex. A, page 3. The appellant telephoned Summers on February 16, 2006, to discuss his concern that he would lose his health benefits coverage if he was removed. *Id.*, Ex. B; Tab 21, Subtab 6 at 5-6. The appellant's written memorialization of that conversation includes the two following questions and answers:

> I asked Theresa Summers the following specific questions and received the following replies.
>
> Question: "The time runs out on Sunday[,] February 19[,] and if I received a letter by FED EX on Saturday[,] February 18[,] which

> terminated me on Monday (a federal holiday), February 20, 2006, which would be within management's right to do under the regulations?"
>
> Reply: "Yes."
>
> Question: "And then I would have a lapse in my health benefits and would not be able to continue those?"
>
> Reply: "What would happen[,] you would be provided a 31[-]day extended coverage to allow you to convert to a private plan. But, you are correct in the fact that the health benefits would end."

IAF, Tab 9, Ex. B; Tab 21, Subtab 6 at 6. Based on Summers' information that he would lose his Federal Employee Health Benefits (FEHB) if he was removed from service, the appellant submitted his retirement effective Friday, February 17, 2006. IAF, Tab 9, Subtab C; Tab 21, Subtab 6 at 7. The appellant's retirement documentation contains the following paragraph in two places on the document (SF-52):

> Coerced to retire rather than being removed for declining a directed reassignment which I protested. My administrative leave for "Notice of Proposed Removal" ends as early as 02/20/2006 and I have not received a decision from the deciding official (David Geiser) who has had my written response to the proposed removal since 01/16/2006. This proposed retirement date of 02/17/2006 was essential to assure there is not a lapse in my health insurance if the LM decision is to remove me.

IAF, Tab 9, Subtab C at 2.

¶6 The appellant submitted a March 1, 2006 mixed-case equal employment opportunity complaint asserting that he was coerced into retirement because the agency did not have a bona fide reason for his directed reassignment and the agency proposed to remove him for failing to accept the reassignment; and, further, that the agency's reassignment outside of his commuting area constituted

age discrimination. IAF, Tab 1, attachment. The agency issued a final agency decision (FAD) denying the complaint on April 17, 2007. *Id.*

¶7 The appellant filed a timely appeal from the FAD on April 30, 2007, in which he requested a hearing on his assertions that he was coerced into retirement because the agency did not have a bona fide reason for his directed reassignment, the agency had proposed to remove him for failing to accept the directed reassignment, the agency had provided him with misinformation regarding the continuation of his FEHB if the agency had removed him in lieu of his retirement, and the agency's directed reassignment and proposed removal actions constituted age discrimination. IAF, Tab 1. The administrative judge (AJ) fully informed the appellant regarding the Board's jurisdiction over involuntary retirement appeals, the appellant's burden of making nonfrivolous allegations of coercion or misinformation to establish the Board's jurisdiction over his appeal. IAF, Tabs 3-4. The appellant had been fully informed of his burden of proof to establish a disparate treatment age discrimination claim in the April 17, 2007 FAD, which the appellant had attached to his appeal. IAF, Tab 1, attached April 17, 2007 FAD at 5-8. The AJ ordered the appellant to submit evidence and argument establishing the Board's jurisdiction. IAF, Tab 4 at 3.

¶8 The appellant filed a response in which he asserted that the agency had coerced his retirement because the agency did not have a bona fide reason for his directed reassignment, the agency had proposed to remove him due to his failure to accept the directed reassignment, the agency's actions constituted age discrimination, and the agency had provided him with misinformation regarding the continuation of his FEHB if the agency had removed him – that he would lose his FEHB coverage. IAF, Tab 9; Tab 23 at 3; Tab 31 at 7, 12. The agency filed a response to the jurisdictional order to show cause and a separate motion for summary judgment. IAF, Tabs 11, 21-22. The AJ held a hearing on the appellant's claims on August 2, 2007, Hearing Compact Disc 1, and August 15, 2007, Hearing Compact Disc 2.

¶9 In the initial decision following the hearing, the AJ thoroughly reviewed the evidence regarding the appellant's directed reassignment and found that the appellant had failed to prove that his retirement was coerced by an improper reorganization and reassignment because the agency proved that legitimate management considerations supported its reorganization and the appellant's reassignment, thereby establishing a bona fide basis for the appellant's reassignment, and the appellant had failed to prove that the reorganization/reassignment had no substantial basis in personnel practice or principle. IAF, Tab 36, Initial Decision (ID) at 2-15. The AJ also found that, because the agency had a legitimate management reason for the appellant's directed reassignment, the evidence would have supported the appellant's removal for refusing to accept that reassignment and, thus, the appellant had failed to prove that the agency's removal action improperly coerced his retirement decision. ID at 15-16.

¶10 However, the AJ found that an employee is not required to show an intent to deceive on the part of an agency in order for a retirement to be held involuntary as a result of agency misinformation. ID at 16. The AJ noted the precedent of the Board and its reviewing court holding that an agency's misleading statements upon which an appellant reasonably relies to his detriment are sufficient to render an action involuntary, and that the agency need not be aware that the statements were misleading, but may have instead provided them to the appellant negligently or innocently. *Id.* The AJ found "the appellant's testimony and demeanor entirely credible" and "that the appellant testified in a straightforward and sincere manner when he stated that he was misled by Summers' advice concerning his continued entitlement to FEHB coverage." *Id.* The AJ quoted the appellant's memorialized questions to Summers and Summers' responses indicating that he would lose his entitlement to continued FEHB if the agency effected his removal. ID at 16-17. The AJ noted Summers' hearing testimony that she informed the appellant that "if he did not retire and he were [sic] removed from Federal

service, his FEHB plan would terminate at the end of the pay period and he would have 31 days of extended coverage in order to convert to a private plan." ID at 17. The AJ noted the appellant's testimony "that it was absolutely necessary that he maintain his FEHB plan. Therefore, he retired, effective February 17, 2006, citing [on his retirement paperwork] his need to keep his FEHB plan from lapsing in the event that he was removed." *Id.*

¶11 The AJ found that the appellant was very concerned that, if he were removed, his FEHB plan would be terminated and, further, that the appellant had identified this as a source of concern to Summers on at least two occasions. *Id.* Referring to Chapter 44, Subsection F of the Office of Personnel Management's "CSRS and FERS Handbook for Personnel and Payroll Offices," the AJ found that because the appellant met the age and service requirements for a discontinued service retirement annuity under 5 U.S.C. § 8336(d), the "appellant's removal for failure to take a directed reassignment outside of his local commuting area would make him eligible for a discontinued [service retirement] annuity and for his continued FEHB coverage after the date the agency effected his removal." ID at 17-18 & n.7. Thus, the AJ found that Summers, in fact, misled the appellant about his ability to continue his FEHB coverage because the appellant could have let the agency effect his removal and still retained his entitlement to FEHB coverage. ID at 18. The AJ concluded that:

> The agency was on notice of the appellant's concerns about his FEHB plan lapsing. The appellant specifically stated in his SF-52 [retirement paperwork] that he was forced to retire in order to avoid such a lapse. I find that the appellant was misled by Summers' statement that his FEHB coverage would lapse if he were removed and his only option was to covert to a private plan. Further, I find that the agency's Human Resources Specialists, including the person who accepted the appellant's SF-52, failed to correct the appellant's erroneous belief that he must retire on February 17, 2006, in order to maintain his FEHB plan.

> The appellant's decision to retire, effective February 17, 2006, made "with blinders on," and based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness and due process. Covington v. Department of Health & Human Services, 750 F.2d 937, 943 (Fed. Cir. 1984). The agency's actions were negligent given the specific disclosures made by the appellant. I find that the appellant has shown, by preponderant evidence, that his retirement was involuntary and as such, tantamount to a removal.

ID at 18-19. The AJ went on to find that the appellant failed to prove his claim of age discrimination.* ID at 19-20.

¶12 The AJ reversed the appellant's constructive removal, ordered the agency to restore the appellant to his last official position of record effective February 17, 2006, and to pay the appellant the back pay and benefits to which he is entitled in accordance with OPM's regulations. ID at 20-22. The AJ ordered the agency to provide interim relief in the event either party filed a petition for review and ordered the agency to submit proof of its compliance with the interim relief order if it filed a petition for review. ID at 22.

¶13 The agency has filed a petition for review of the initial decision's finding of a constructive removal and the order to provide the appellant with interim relief, and the appellant has responded in opposition to the agency's petition. The agency has submitted evidence that it has provided the appellant with an interim appointment in nonduty status in accordance with 5 C.F.R. § 772.102(a). Petition For Review File, Tab 1, attachment. That interim appointment will end upon the issuance of this Opinion and Order. *See* 5 C.F.R. § 772.102(b).

ANALYSIS

¶14 We see no error in the AJ's analysis and conclusions in the initial decision except, for the reasons set forth below, in regard to her decision to order the

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* The appellant did not file a cross-petition for review or otherwise challenge on review the AJ's ruling on his age discrimination claim.

agency to provide the appellant with interim relief under the particular circumstances of this case.

The AJ abused her discretion in ordering interim relief under the circumstances of this case.

¶15 An employee who obtains relief in an initial decision is entitled to the relief provided in the decision effective upon the making of the decision and remaining in effect pending the outcome of the petition for review, unless the AJ determines that the granting of interim relief is not appropriate. *See* 5 U.S.C. § 7701(b)(2)(A); *Armstrong v. Department of Justice*, 107 M.S.P.R. 375, ¶ 11 (2007). An interim relief order is subject to challenge on petition for review. *See Armstrong*, 107 M.S.P.R. 375, ¶ 11; *Brown v. U.S. Postal Service*, 54 M.S.P.R. 275, 277 (1991).

¶16 The purpose of the statutory interim relief provision is not to make the appellant whole at the interim relief stage of the proceedings. *See Armstrong*, 107 M.S.P.R. 375, ¶ 12. Rather, the intent of interim relief is to protect the appellant from hardship during the pendency of his appeal if he prevails in the initial decision. *Id*. It is a fundamental element of interim relief that the appellant be reinstated with pay effective as of the date of the initial decision. *Id.*, ¶13. However, the Board has found that there are circumstances where it is inappropriate to order interim relief. *See, e.g., Chaney v. U.S. Postal Service*, 67 M.S.P.R. 1, 2-3 (1995) (the Board found that it need not address whether the agency had complied with the interim relief order in this involuntary retirement case stemming from the 1992-93 Postal Service reorganization, because the Board had stayed interim relief in this and similar such cases given its finding that interim relief was inappropriate under the circumstances of such cases), *aff'd*, 86 F.3d 1176 (Fed. Cir. 1996) (Table); *Davis v. Department of Justice*, 61 M.S.P.R. 92, 95-96 (interim relief should not be ordered if the appellant is receiving worker's compensation when the initial decision is issued; such relief could result in statutorily prohibited dual monetary payments, and the appellant would not be

without an income absent interim relief), *aff'd,* 43 F.3d 1485 (Fed. Cir. 1994) (Table); *Siu v. Office of Personnel Management,* 59 M.S.P.R. 394, 396 (1993) (interim relief generally should not be ordered in a retirement case involving a dispute over the amount of an annuity, since compliance would create an annuity overpayment if the initial decision does not withstand review, and the appellant is already receiving an annuity); *see also Nadolski v. Merit Systems Protection Board,* 105 F.3d 642, 643-45 (Fed. Cir. 1997) (finding that the Board had good cause to waive the procedural requirement that it dismiss an agency's petition for review for failure to submit evidence that it had provided appropriate interim relief because the Board had found that interim relief should not have been granted in this involuntary retirement appeal where the appellant's former position had been abolished in a reorganization and, even if the Board's waiver of the procedural requirement was defective, the agency was not obligated under 5 U.S.C. § 7701(b)(2)(B) to recreate an unnecessary position that had been abolished in a reorganization).

¶17 The AJ found that the agency properly conducted a reorganization of its LM office, abolished the appellant's former position, and directly reassigned the appellant to a new position in the LM Headquarters Office in Washington, D.C., as part of that reorganization process. ID at 2-6, 10-11, 13-15. The AJ also found that the appellant rejected the directed reassignment and retired, with entitlement to an immediate retirement annuity, effective February 17, 2006. ID at 6, 9, 17-18. The appellant could have remained in a retirement status until the Board issued a final order directing the agency to cancel the appellant's retirement and to restore the appellant retroactive to the date of his retirement. The interim relief order required the agency to place the appellant in his former position, which had been abolished, and the appellant would not have suffered an undue hardship in waiting for the final order given that he was receiving a retirement annuity. We find that it was inappropriate to order the agency to provide interim relief given that the agency had abolished the appellant's former

position and the appellant was receiving retirement annuity payments at the time of the initial decision. *See Nadolski,* 105 F.3d at 644-45; *Chaney,* 67 M.S.P.R. at 2-3. We therefore VACATE the interim relief order. We also DENY the appellant's motion to dismiss the agency's petition for review due to its alleged failure to comply with the interim relief order given that interim relief should not have been ordered. *See Chaney,* 67 M.S.P.R. at 3; *Siu,* 59 M.S.P.R. at 396.

We further address the appellant's entitlement to be returned to the status quo ante and to back pay under the unusual circumstances of this case.

¶18 When an appellant prevails in an adverse action appeal, we would normally issue a final order directing the agency to cancel the appellant's separation and to reinstate him to the status quo ante; i.e., to restore the appellant to his former position of record and provide him with back pay and benefits retroactive to the date of his separation. *See Miller v. Department of the Army*, 109 M.S.P.R. 41, ¶ 11 (2008); *Williams v. Department of the Army,* 44 M.S.P.R. 449, 450, 455 (1990). However, we find that further consideration of the status quo ante and the appellant's entitlement to back pay is warranted under the unusual circumstances of this case.

¶19 The ultimate goal when the Board orders an agency to cancel an action is to, as nearly as possible, place the appellant in the status quo ante, that is, in the situation in which he would have been had the wrongful personnel action not occurred. *House v. Department of the Army,* 98 M.S.P.R. 530, ¶ 9 (2005); *Mascarenas v. Department of Defense,* 57 M.S.P.R. 425, 430 (1993). The appellant is not entitled to be placed in a better position than he would have enjoyed had the adverse action not occurred. *Silvestri v. Department of the Army*, 60 M.S.P.R. 580, 584 (1994).

¶20 The status quo ante in this case includes that: the appellant's former position had been abolished in a legitimate reorganization; the appellant had been given a directed reassignment to a new position in the LM Headquarters Office in

Washington, D.C., effective January 8, 2006; the appellant had refused that directed reassignment on January 4, 2006; the appellant had been placed on administrative leave effective January 9, 2006; the agency had proposed the appellant's removal due to his refusal to accept the directed reassignment; the appellant had responded to the removal proposal; the agency could have issued a decision that involuntarily separated the appellant with an effective date of Monday, February 20, 2006; and the appellant involuntarily chose to take an immediate retirement effective Friday, February 17, 2006, so as to avoid the potential loss of his FEHB, which he had been erroneously informed would occur if he was removed. ID at 2-11, 13-18. Further, the AJ found that the appellant's decision to retire was not coerced by the agency's removal action because the agency proved that it had a legitimate basis for proposing that action. ID at 13-16. In restoring the appellant to the status quo ante, he is subject to those same circumstances.

¶21 A determination of the appropriate relief in this appeal is complicated by the directed reassignment (which the AJ found to have been taken for legitimate reasons) and the absence of an agency decision on the notice of proposed removal. The appellant's refusal to accept his directed reassignment in January 2006 creates a substantial issue as to the scope of appropriate relief. *See Washington v. Tennessee Valley Authority*, 22 M.S.P.R. 377, 379 (1984) (although the Board mitigated the appellant's removal for cause to a reprimand, the appellant would have properly been subject to separation by reduction in force (RIF) but for his prior removal for cause, and the agency was not prohibited from retroactively separating the appellant by RIF; "[t]o prohibit the agency from retroactively separating appellant by RIF in this situation would result in mandatory placement of appellant in a better position than he would have enjoyed if he had not been wrongfully removed"), *aff'd*, 770 F.2d 180 (Fed. Cir. 1985) (Table). Based on the record in this matter, it seems likely that the agency would have decided to remove the appellant for failure to accept his directed

reassignment had he not retired on February 17, 2006. Had that occurred, the appellant would have been eligible for a retirement annuity upon his separation from service. IAF, Tab 9, Subtab D at 3. Thus, even in the absence of the misinformation from the agency regarding his FEHB, the appellant likely would have been separated from service and retired shortly after February 17, 2006. Had the appellant not retired on February 17, 2006, the agency could have effected his removal as early as the following week. *See* 5 U.S.C. § 7513(b) (an employee is entitled to at least 30-days advance written notice of a removal action under 5 U.S.C. ch. 75); IAF, Tab 21, Subtab 14 (amendment to notice of proposed removal received by the appellant on January 21, 2006).

¶22 In these circumstances, the Board's relief order must take into account the appellant's impending removal for failing to accept his directed reassignment, otherwise the appellant would be placed in a better position than he would have enjoyed if he had not retired on February 17, 2006. *See Washington*, 22 M.S.P.R. at 379. Thus, the appropriate relief in this appeal is to cancel the appellant's involuntary retirement, restore him with appropriate back pay and other benefits from February 17, 2006, until the date he would otherwise have been separated from service, and adjust his retirement annuity accordingly. *See Washington*, 22 M.S.P.R. at 379; *see also Mixer v. Department of Labor*, 26 M.S.P.R. 481, 482-83 (1985) (the agency properly complied with the Board's order to cancel the appellant's involuntary resignation where, after canceling the resignation, the agency retroactively effected a RIF that had been previously proposed and was to have taken effect 1 day after her resignation). Had the agency removed the appellant in February 2006 for failing to accept his directed reassignment outside of his local commuting area, the appellant would have possessed all of the requisite requirements for either an immediate retirement or a discontinued service retirement under 5 U.S.C. § 8336(a), (d). IAF, Tab 1 at 3. Consistent with OPM's instructions in Chapter 44, Subsections 44A1.1-2, 44A1.1-3, 44A2.1-1, and 44A2.1-3, of OPM's "CSRS and FERS Handbook for Personnel and

Payroll Offices," the agency would have been required to effect the appellant's involuntary separation through either an immediate retirement or a discontinued service retirement, at the appellant's election. Further, the appellant would have remained eligible to retain his FEHB in his retirement in accordance with 5 U.S.C. § 8905(b) and 5 C.F.R. § 890.303(a). Thus, if the agency subsequently effects the appellant's involuntary separation for failing to accept his directed reassignment outside of his local commuting area, the appellant would be entitled to a later retirement date. *See Gammill v. Office of Personnel Management,* 29 M.S.P.R. 484, 489 (1985) (the appellant's reasonable detrimental reliance on erroneous information from his employing agency warranted a change in his retirement date).

¶23 We note, however, that the agency never acted on the notice of proposed removal. Only the agency may take such an action against the appellant. *See McCollum v. National Credit Union Administration,* 417 F.3d 1332, 1340 (Fed. Cir. 2005) ("Where the agency has not acted, an employee's removal cannot be in accordance with law."). The parties have not presented specific evidence and argument on this issue, and based on the existing record, we cannot determine if, and when, the appellant would otherwise have been separated from service had he not retired on February 17, 2006. Accordingly, we direct the agency to make a determination on this issue.

ORDER

¶24 We ORDER the agency to cancel the appellant's retirement and restore him retroactive to February 17, 2006. We further ORDER the agency to determine if, and when, the appellant would have otherwise been separated from service had he not retired on February 17, 2006, and to take such action as is necessary to ensure that the appellant's retirement annuity is adjusted accordingly. *See Kerr v. National Endowment for the Arts,* 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶25 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶26 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶27 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶28 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶29 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no

later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your

representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.